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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 MICHAEL ALAN SHAW,

11 Plaintiff,

12 v.

13 NANCY A BERRYHILL, Acting
Commissioner of Social Security,

14 Defendant.
15

CASE NO. 3:17-CV-05779-DWC

ORDER ON PLAINTIFF'S MOTION
FOR REMAND

16 Plaintiff Michael Allen Shaw filed this action, pursuant to 42 U.S.C. § 405(g), for judicial
17 review of Defendant's denial of his application for disability insurance benefits ("DIB").

18 Currently pending in this case is Plaintiff's Motion for Sentence Six Remand for Consideration
19 of Additional Evidence. Dkt. 10. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure
20 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the
21 undersigned Magistrate Judge. *See* Dkt. 2.

22 The Court concludes Plaintiff has failed to show he meets the good cause requirement
23 for remand pursuant to sentence six of 42 U.S.C. § 405(g). Therefore, the Motion (Dkt. 10) is
24 denied.

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In the Motion, Plaintiff requests the Court remand this case pursuant to sentence six of 42 U.S.C. § 405(g). Dkt. 10. Attached to the Motion is a letter from Plaintiff's attorney, Charles Talbot, sent to the Appeals Council on July 5, 2016 and a report completed by Dr. Joseph A. Moisan, Ed.D, NCC, CCM. Dkt. 10-1.¹ Plaintiff contends Dr. Moisan's report provides evidence which contradicts the vocational expert's testimony that was relied on by the Administrative Law Judge ("ALJ"). *See* Dkt. 10, 10-1.

ORDER ON PLAINTIFF'S MOTION FOR
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1 evidence into the record in a prior proceeding.” 42 U.S.C. § 405(g); *see Melkonyan v. Sullivan*, 501
2 U.S. 89 (1991). Notably, “[a] claimant does not meet the good cause requirement by merely
3 obtaining a more favorable report once his or her claim has been denied. To demonstrate good
4 cause, the claimant must demonstrate that the new evidence was unavailable earlier.” *Mayes v.*
5 *Massanari*, 276 F.3d 453, 463 (9th Cir. 2001) (citing *Key v. Heckler*, 754 F.2d 1545, 1551 (9th
6 Cir. 1985)).

7 In the Motion, Plaintiff does not explicitly explain how he meets the requirements for a
8 sentence six remand. *See* Dkt. 10. Plaintiff appears to argue Dr. Moisan’s report is material
9 because it contradicts the testimony of the vocational expert that the ALJ relied on to find
10 Plaintiff was not disabled. *Id.* Plaintiff does not allege he meets the “good cause” requirement.
11 *Id.*

12 Here, even assuming Plaintiff has met the materiality requirement, Plaintiff has not
13 demonstrated good cause. As stated above, to demonstrate “good cause,” Plaintiff must show the
14 new evidence was unavailable earlier. *Mayes*, 276 F.3d at 463. In his Motion, Plaintiff provides
15 no explanation, and the Court cannot infer, why Dr. Moisan’s report could not have been
16 available earlier, before the ALJ issued her decision. *See* Dkt. 10. Instead, Plaintiff obtained and
17 submitted Dr. Moisan’s report nearly six months after the ALJ hearing and two months after the
18 ALJ issued her decision. *See* AR 39-77 (hearing dated January 6, 2016); AR 12-38 (ALJ
19 decision dated April 26, 2016); Dkt. 10-1 (Dr. Moisan’s report dated June 30, 2016). Dr. Moisan
20 states he was requested by Plaintiff’s counsel to review the jobs testified to by the vocational
21 expert at the January 6, 2016 hearing. *See* Dkt. 10-1, p. 5. Plaintiff’s counsel represented Plaintiff
22 at the hearing and fails to provide any explanation regarding why he did not obtain the report
23 between the hearing and the ALJ’s decision. *See* Dkt. 10. Therefore, Plaintiff has not met his
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1 burden of showing that the new evidence was unavailable earlier, and therefore, he has not met
2 the requirements of a remand under sentence six of 42 U.S.C. § 405(g). *See Clem v. Sullivan*,
3 894 F.2d 328, 332 (9th Cir. 1990) (citing *Key*, 754 F.2d at 1551) (“A claimant does not meet the
4 good cause requirement simply by obtaining a more favorable report from an expert witness once
5 his claim is denied ... The claimant must establish good cause for not seeking the expert's opinion
6 prior to the denial of his claim.”); *Cherry v. Berryhill*, 2017 WL 750307, at *2 (W.D. Wash.
7 Feb. 27, 2017) (finding plaintiff failed to meet good cause standard where there was no
8 explanation as to why new evidence that was submitted to the Appeals Council was not
9 available earlier); *Vasquez v. Colvin*, 2014 WL 65305, at *7 (D. Ariz. Jan. 8, 2014) (same).

10 The Court notes, in his Reply, Plaintiff belatedly argues the ALJ made it clear she was
11 not going to allow cross examination of the vocational expert and thus, it could be assumed the
12 ALJ would not consider anything in writing after the hearing. *See* Dkt. 12. Plaintiff did not raise
13 this argument in his Motion and, thus, has waived the argument. *See* Dkt. 10, 11, 12; *Thompson*
14 *v. Commissioner*, 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)
15 (“appellants cannot raise a new issue for the first time in their reply briefs”) (citing *U.S. v. Puchi*,
16 441 F.2d 697, 703 (9th Cir. 1971), *cert. denied*, 404 U.S. 853 (1971)); *Ass'n of Irrigated*
17 *Residents v. C & R Vanderham Dairy*, 435 F.Supp.2d 1078, 1089 (E.D. Cal. 2006) (“It is
18 inappropriate to consider arguments raised for the first time in a reply brief.”).

19 Nevertheless, even if the Court were to consider this argument, Plaintiff has provided
20 only a speculative statement that the ALJ would not consider additional evidence submitted to
21 her after the hearing. Plaintiff’s speculation regarding the ALJ’s conduct does not explain why
22 he was unable to obtain the evidence earlier. Therefore, even if the Court were to consider this
23 argument, the Court finds Plaintiff has failed to meet the “good cause” requirement.

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Dated this 22nd day of February, 2018.

David W. Christel
United States Magistrate Judge